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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91198483
Party	Plaintiff PsyBar LLC
Correspondence Address	ROBERT A GUST BERNICK LIFSON PA 5500 WAYZATA BLVD, SUITE 1200 MINNEAPOLIS, MN 55416 UNITED STATES bgust@bernicklifson.com, bdarkow@bernicklifson.com
Submission	Other Motions/Papers
Filer's Name	Robert A. Gust
Filer's e-mail	bgust@bernicklifson.com, bdarkow@bernicklifson.com
Signature	/Robert A. Gust/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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PsyBar, LLC,

Opposition No.: 91198483  
Serial No.: 85095429

Opposer,

v.

David Mahony, PhD.,

Applicant.

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OPPOSER PSYBAR, LLC'S TRIAL MEMORANDUM

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BERNICK LIFSON, P.A.  
Robert A. Gust, Minn. Bar #158847  
5500 Wayzata Boulevard, Suite 1200  
Minneapolis, MN 55430  
bgust@bernicklifson.com  
O: (763) 546-1200  
F: (763) 546-1003

*Attorney for Opposer*

David Mahony  
30 Bayard Street, Apt. #1F  
Brooklyn, NY 11211

*Applicant*

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## **INTRODUCTION**

Opposer PsyBar, LLC (“PsyBar”) is a psychological testing and evaluation company that filed its opposition when a former affiliate attempted to register the trademark “PsyBari” in connection with a psychological evaluation tool he had developed. The marks are almost identical and, even if people in the relevant market notice the difference, an affiliation is still suggested. Applicant’s proposed registration must be denied.

## **STATEMENT OF THE RECORD**

PsyBar submitted the testimony of its Chairman, Dr. David Fisher. Applicant David Mahony did not submit any testimony or other evidence. As a result, the only thing for consideration is the Fisher testimony, the PsyBar registration (#1998368), and the PsyBari application.

## **STATEMENT OF ISSUE**

Whether the mark “PsyBari” is likely to cause confusion with “PsyBar,” when PsyBari is proposed as a mark for an objective psychological test and PsyBar is a registered mark for a company that offers objective psychological testing.

## **FACTUAL BACKGROUND**

### **A. PsyBar is a Well-Known Provider of Psychological Testing and Evaluation Services.**

PsyBar is a Minnesota limited liability company that was organized in 1995. *See* Fisher transcript P. 3-4. It has continuously used the name “PsyBar” in commerce since 1995. *Id.* The trademark was registered in 1996 (#1998368) and the registration remains current. *Id.* *See also* Notice of Opposition.

PsyBar provides psychological consulting services for attorneys, insurance companies, employers, employee assistance programs, and others. Fisher Tr. at 4-6. PsyBar frequently examines patients directly, but also does file reviews in which it relies on and evaluates the examination and treatment done by other medical professionals. Fisher Tr. at 5-6, 8-9. PsyBar does not have a physician-patient relationship with the individuals examined, and provides its analysis and opinion to others. *Id.* at 9. PsyBar's service involves psychological testing, and it uses or reviews a variety of psychological tests and issues reports relating to them. *Id.* at 6.

PsyBar considers itself the nation's leading and best-known provider of some of its services. *Id.* at 10 and 21. PsyBar has worked with hundreds of Fortune 500 companies, does as many as thirty seminars or conferences a year, and currently has a marketing budget of about \$250,000. *Id.* at 9-10. PsyBar performs its services through a network of approximately seventeen hundred medical professionals throughout the United States. *Id.* at 8. The relevant market of people with a business connection to the PsyBar mark includes psychiatrists, psychologists, insurance companies, employers, employee assistance programs, and attorneys. *Id.* at 11-13.

**B. David Mahony is a Psychologist Who Created a Psychological Test.**

In 2003, Applicant David Mahony signed an agreement to operate as one of PsyBar's independent medical examiners. *Id.* at 22-23. While it does not appear he ultimately did any work for PsyBar, he clearly had the opportunity to become familiar with the name and the services provided. *Id.* Yet, he chose the same word, with the same capitalization, and merely added an "i."

Because Applicant has not put in any evidence, the understanding of the use of the PsyBari comes from Dr. David Fisher. The PsyBari is a test that is given to evaluate candidates for bariatric surgery. *Id.* at 25. There are an estimated 250,000 candidates for bariatric surgery in the United States, and the fact that PsyBar has not yet encountered the PsyBari is probably because the PsyBari's current use is not yet widespread. *Id.* at 29-30.

Both PsyBar and the PsyBari tests are, or utilize, objective psychological assessment methods to provide assessments of patients. *Id.* at 15-17. Objective tests are things like the MMPI or an IQ test, as opposed to a subjective test dependent on the interpretation provided by the person administering the test. *Id.* As a result, the PsyBari is the same type of test that PsyBar regularly reviews and evaluates as part of its services. *Id.* at 16.

There is a significant similarity in the markets for PsyBar's services and Applicant's PsyBari test. For example, healthcare providers, insurers, employers, employee assistance programs, and attorneys rely on PsyBar to identify patients who are appropriate for surgical procedures or who may be eligible for other insurance benefits. *Id.* at 20-21. Applicant's PsyBari test is focused on patients seeking bariatric surgery, but is used for substantially the same purposes that PsyBar currently uses other similar tests. While PsyBar's relevant market includes patients who are not obese and not likely to ever take the PsyBari, virtually every PsyBari exam given has the potential to become part of a PsyBar report.



## DISCUSSION

### **A. Applicant's Mark Should be Denied Because it is Likely to be Confused with PsyBar's Prior Mark.**

Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), is the statutory basis for a refusal to register due to likelihood of confusion with another mark. 15 U.S.C. §1052 provides that:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . (d) Consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive . . .

15 U.S.C. §1052(d). Specifically, the issue is whether or not there is a likelihood of confusion, mistake, or deception as to the source or sponsorship of the goods or services related to an applicant's mark. *See In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 16, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) (“...mistaken belief that [a good] is manufactured or sponsored by the same entity ... is precisely the mistake that Section 2(d) of the Lanham Act seeks to prevent”).

In determining whether or not an opposed mark should be denied registration due to the likelihood of consumer confusion, the Board generally focuses on the possibility that the purchasing public would mistakenly assume that an “applicant's goods originate from the same source as, or are associated with,” an opposer's goods. *See In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In *Hilson Research, Inc. v. Society for Human Resource Management*, the Board found that,

“[a]lthough confusion, mistake or deception about source or origin is the usual issue posed under Section 2(d), any confusion made likely by a junior user’s mark is cause for refusal; likelihood of confusion encompasses confusion of sponsorship, affiliation or connection.” *See Hilson, supra*, 27 USPQ2d 1423, 1429 (TTAB 1993).

**B. The Fact that PsyBar Does Not Have a Test that Directly Competes with the PsyBari is Not Relevant.**

Applicant apparently will rely on the argument that PsyBar does not market its own psychological test for bariatric patients and that, as a result, the parties are not currently direct competitors. That is not, however, the standard. Trademark law protects against any likelihood of confusion.

The factors considered in cases involving entities that are not direct competitors are generally known as the “*Lapp* factors.” *See Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460 (3d Cir. 1983). The factors are the same or similar to the factors laid out in *E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). The *Lapp* elements are as follows:

1. The degree of similarity between the owner’s mark and the alleged infringing mark;
2. The strength of the owner’s mark;
3. The price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase;
4. The length of time the defendant has used the mark without evidence of actual confusion;

5. The intent of the defendant in adopting the mark;
6. The evidence of actual confusion;
7. Whether the goods, though not competing, are marketed through the same channels of trade and advertised through the same media;
8. The extent to which the targets of the parties' sales efforts are the same;
9. The relationship of the goods in the minds of consumers because of similarity of function; and
10. Other facts suggesting that the consuming public might expect the prior owner to manufacture a product in the defendant's market, or that he is likely to expand into the market.

*Id.* at 463.

Generally, the two factors that are key considerations in any likelihood of confusion determination are: 1) the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation, and commercial impression; and 2) the relatedness of the goods or services as described in the application and registration(s). *See, e.g., Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1244 (TTAB 2010); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009). In the present case, PsyBar has introduced extensive and uncontroverted evidence concerning nearly all the factors that support denial.

**1. The Marks are Very Similar.**

The similarity of the marks as to appearance, sound, connotation, and commercial impression is obvious, as the marks are almost identical. Adding a single letter does not substantially change the appearance and it is likely that most people coming in contact with the words will not even be aware that they are different words. That similarity is exacerbated by the fact that Applicant chose to capitalize the “P” and the “B” in the exact same manner as PsyBar. Even if a consumer detected the different spellings, a typical consumer would likely conclude a direct relationship existed between the two marks and their respective services.

The case of *Communications Satellite Corp. v. Comcet, Inc.*, 429 F.2d 1245, 166 USPQ 353 (4<sup>th</sup> Cir. 1970); *cert. denied* 400 U.S. 942, 167 USPQ 705 is particularly instructive. Plaintiff held the trademark “Comsat” and brought an infringement action against the use of “Comcet.” In finding a likelihood of confusion, the Court stated:

There can be no doubt about the resemblance of Comcet to Comsat. They sound almost identical, and visual differences are slight. Whether the test be common law or statute, the likeness is so striking that it is apparent that Comcet — though requested not to do so — is using a colorable imitation of Comsat’s name and mark.

*Id.* at 1249.

Other courts have also found a likelihood of confusion between far less similar marks. *See China Healthways Inst., Inc. v. Wang*, 491 F.3d 1337, 1341, 83 USPQ 1123 (Fed. Cir. 2007) (the common word in Chi and Chi Plus is likely to cause confusion despite differences in the marks’ designs); *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 201, 175 USPQ 558 (CCPA 1972) (West Point Pepperell likely to cause confusion with

West Point for similar goods); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 54 C.C.P.A. 1295, 376 F.2d 324, 153 USPQ 406 (1967) (The Lilly as a mark for women's dresses is likely to be confused with Lilli Ann for women's apparel including dresses); *In re United States Shoe Corp.*, 299 USPQ 707 (TTAB 1985) (Career Image for women's clothing stores and women's clothing likely to cause confusion with Credit Career Images for uniforms including items of women's clothing). The Board has also recognized that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." See *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877, 23 USPQ 1698 (Fed. Cir. 1992).

Adding the letter "i" is not much different from adding an "s." In fact, some words are made plural by adding an "i." Furthermore, when the mark is presented in all capitals, the "I" looks the same as a Roman numeral, giving the impression that PSYBARI is an iteration of PSYBAR. Thus, even if consumers pay close enough attention to notice the slight difference in spelling, they are still likely to be confused.

## **2. The Strength of the PsyBar Mark Increases the Likelihood of Confusion.**

PsyBar is an invented word, which makes it a strong mark. Adding a random letter to an already fanciful mark creates a greater likelihood of a false suggestion of an affiliation. For example, there is little question that the Board would quickly reject Exxoni or Xeroxi. In the market in which PsyBar operates, PsyBari is no different. It is virtually identical to "PsyBar," and the difference actually suggests an affiliation.

The *Comsat* case is again instructive. The Court stated:

Comsat is a coined word that is not found in any dictionary. No one else is using it as a trade name, trademark, service mark, or for any other purpose. Comsat has only one function. It uniquely identifies the plaintiff's business and services.

*Id.* at 1248.

The Court also held that Comsat was a strong mark. In reaching that conclusion, the Court stated that the prefix “Com” could refer to many things, so it was not merely descriptive. That part of the opinion could have helped Applicant if the issue in this case only involved the prefix “Psy.” Applicant did not, however, only copy the first syllable – he copied the entire mark. Marks must be evaluated as a whole, and the fact that a syllable is used by others irrelevant. *See Skelly Oil Co. v. Powerine Co.*, 86 F.2d 752, 753, 32 USPQ 51 (Cust. & Pat App 1936).

While “strength of the mark” generally refers to whether the mark is descriptive, suggestive, arbitrary, or fanciful, it is also relevant if a mark is well known. *See du Pont, supra*, at 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). Famous marks are afforded a broad scope of legal protection because they are more likely to be remembered and associated in the public mind than a weaker mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1374, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005); *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 1371-76, 63 USPQ2d 1303, 1305-09 (Fed. Cir. 2002) (finding opposer's marks, Acoustic Wave and Wave, to be famous and thus entitled to broad protection). When present, the fame of a mark is “a dominant factor in the likelihood of confusion analysis . . . independent of the

consideration of the relatedness of the goods.” *Recot, Inc. v. Becton*, 214 F.3d 1322, 1328, 54 USPQ2d at 1898.

The PsyBar mark is famous within the Applicant’s and PsyBar’s industry. PsyBar’s advertising and publicity of its services are national in scope, as are the provision of the services and its customer base. PsyBar has used and promoted its mark nationally for more than seventeen years and is the nation’s leading and best-known provider of forensic psychological and psychiatric assessment litigation services. PsyBar constitutes and is considered to be a “famous mark,” particularly within the forensic and legal communities. *See Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001 (Fed. Cir. 2002) (reasonable doubt as to likelihood of confusion is resolved against the newcomer “for the newcomer has the opportunity of avoiding confusion, and is charged with the obligation to do so.”).

**3. The Conditions Under Which Consumers Come in Contact with the Marks Supports Denial.**

This factor is generally a consideration with impulse purchases because of the greater likelihood of harm. This dispute does not involve impulse purchases, but the circumstances of the confusion create the same problem. These are not two products sitting on a shelf for comparison. In many cases, the marks would not be viewed at the same time. Thus, someone who had been exposed to either PsyBar or PsyBari might not see the other term until later. Thus, detecting the difference is even more difficult. When the person later interacts with either PsyBar or PsyBari, the person has no reason to investigate further because the association is already established.

PsyBar's customers are employers, employee assistance programs, insurance companies, attorneys, and others who would not be expected to know about the PsyBari exam, much less know that it was not affiliated with PsyBar. Furthermore, even among mental health professionals, there is every reason to believe that there would still be confusion.

**4. The Length of Time Without Actual Confusion has been Short.**

The PsyBari test has so far been used by only a handful of psychologists. The fact that the test is still collecting data suggests that it is still in development. Ultimately, however, the potential use is substantial. Furthermore, while the thrust of the current use of "PsyBari" is for psychological testing related to bariatric surgery, PsyBari's trademark application describes its goods and services as follows:

Personality testing for psychological purposes; Providing psychological profiles and psychological record analysis and assessments via a website that are designed to provide custom tailored outputs about recommended resources and treatments associated with a defined set of symptoms and concerns; Psychological assessment services; Psychological testing; Psychological testing services; Psychological tests.

*See* Serial No. 85095429. With the exception of the website reference (which does not appear to be part of PsyBari's current services anyway), the description is a perfect fit for PsyBar's services.



**5. Applicant's Intent Can be Inferred.**

Applicant was fully aware of the existence of PsyBar, as he was once affiliated with it. Applicant has not offered any testimony denying that he was aware of the prior use of the name and the specific manner in which the name was being used. At best, he was completely indifferent to the likelihood of confusion.

Applicant seems to suggest that PsyBari is the only appropriate name for a psychological bariatric test. Even if that were true, it would not create a defense. More importantly, there are numerous other possibilities. Opposer need not speculate on the outcome if other similar words had been used. Opposer has registered "PsyBar" and adding the letter "i" does not adequately distinguish the second mark in light of the overlap in the relationship between the work done by the respective entities.

**6. The Absence of Actual Confusion is Because PsyBari is in its Infancy.**

Although the "nature and extent of any actual confusion" is one of the factors, actual confusion is not a prerequisite to the Board's determination of the likelihood of confusion. As set forth in *Weiss Associates v. Hrl Associates, Inc.*, "The test is likelihood of confusion not actual confusion ... It is unnecessary to show actual confusion in establishing likelihood of confusion." *Id.* at 902 F.2d 1546, 14 USPQ2d 1842-43 (D.C. Cir. 1990); *Apple Computer v. TVNET.net, Inc.*, 90 USPQ2d 1393, 1397 (TTAB 2007). Furthermore, if PsyBar waited for actual confusion to occur, Applicant would surely claim laches.

**7. The Services are Marketed to the Same People.**

There is a significant and meaningful overlap of the consumer bases of PsyBar and Applicant's PsyBari test. The health care providers, insurers, employers, employee assistance programs, and attorneys who use PsyBar's objective psychological testing are the same ultimate consumers of Applicant's PsyBari test. This is not a situation where Applicant seeks to open a saloon called PsyBar in order to sell liquor. PsyBar and PsyBari operate in the exact same arena.

PsyBar offers a broad range of services to a diverse group of customers. While PsyBari's focus is more limited, it easily falls into an area that could be perceived as part of the PsyBar offerings. PsyBar administers or reviews many different types of objective psychological tests. Thus, the PsyBari has the potential to be viewed as a PsyBar "house brand" test.

Applicant will apparently claim that there is no confusion because PsyBar does not currently offer a bariatric exam. That, however, is not the standard. The mere fact that people in the relevant markets could be misled to believe that the PsyBari is affiliated with PsyBar is sufficient. The suggested affiliation could give PsyBari an advantage from the standpoint of credibility. Equally important, a negative opinion of PsyBari could reflect poorly on PsyBar. Similarly, if PsyBar writes reports referencing the PsyBari, the credibility of the report could be impacted if there was a perceived conflict of interest. As a result, the likelihood of confusion is clear.

**8. The Parties' Sales Practices May be the Same.**

Because Applicant did not put in any testimony, it is not clear what sales practices he uses. PsyBar has a marketing budget of approximately \$250,000, and participates in numerous conferences and seminars. Applicant presumably markets his products through word of mouth or scholarly journals. In the end, however, there is an obvious overlap in the target markets.

**9. The Nature of the Services is the Same.**

The relatedness of the parties' products and services is likely to cause confusion. PsyBar and PsyBari are both associated with psychological testing. PsyBari is a specific psychological test, but it is of the type that PsyBar regularly administers and reviews. The fact that the PsyBari is a niche test is irrelevant because it is a niche within the market already served by PsyBar.

PsyBari apparently contends that its application is clinical, while PsyBar's is forensic. While it is unclear whether that is accurate, it does not matter. Clinical testing means work that is done for purposes of diagnosing a patient and is administered by a doctor as part of the physician-patient relationship. *Fisher Tr.* 14-15. Forensics looks at the same thing, but involves an analysis that is done for an employer, insurance company, or someone else other than the patient. *Id.* Clinical and forensic psychology are not, therefore, two vocations that never meet. To the contrary, they both involve the psychological evaluation of individuals, and the only difference is the perspective from which the analysis is being done.

10. **Other Facts Suggest that the Consuming Public Might Expect PsyBar to Expand into Applicant's Market.**

PsyBar performs and evaluates objective psychological tests. The PsyBari is an objective psychological test. PsyBar has pioneered its own protocols in other areas of psychological evaluations. Fisher Tr. 12. There is, therefore, every reason to believe that a person familiar with PsyBar would believe that the PsyBari test was associated with it.


**CONCLUSION**

The likelihood of confusion created by Applicant's marketing of the PsyBari test is substantial. The differences in presentation of the words are so minimal that the relevant market might not even notice the additional letter. Even if persons in the relevant market notice the difference, they are likely to conclude that there is a relationship. Both PsyBar and the PsyBari test include objective psychological assessment methods to provide assessments of patients. Both operate in the same industry and market to the same community of consumers. The registration should be denied.

**Respectfully submitted,**

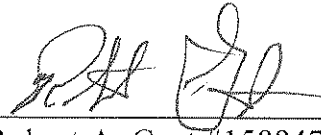
**BERNICK LIFSON, P.A.**

Dated: May 22, 2013

By   
Robert A. Gust, Minn., Bar #158847  
5500 Wayzata Boulevard, Suite 1200  
Minneapolis, MN 55416  
O: (763) 546-1200  
F: (763) 546-1003  
bgust@bernicklifson.com

I hereby certify that a true and complete copy of Opposer PsyBar, LLC's Trial Memorandum has been served on David Mahony, PhD., 30 Bayard Street, Apt. #1F, Brooklyn, NY 11211.

Dated: May 22, 2013



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Robert A. Gust #158847